BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

In the Supreme Court of the United States

October Term, 1942.

No.....

JANE M. STIMSON and BLANCHE M NEWMAN,
Petitioners,

vs.

R. C. TARRANT and BARNES, BUTLER OIL COMPANY, a corporation,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS OF THE COURTS BELOW.

The opinion of the District Court, rendered October 14, 1941, is set forth in full in the record, (R. 61-68) and is reported under the title Stimson, et al v. Tarrant, et al, 43 Fed. Supp. 657. The opinion of the Circuit Court of Appeals was rendered December 15, 1942, is set forth in full in the record, (R. 474) and is reported under the same title in 132 Fed. (2d) 363.

II.

JURISDICTION.

Petitioners adopt the reasons stated in the petition for writ of certiorari (p. 8 hereof) as supporting the jurisdiction of this Court.

III.

STATEMENT OF THE CASE.

Petitioners adopt the "SUMMARY STATEMENT OF THE MATTER INVOLVED", appearing in the petition for writ of certiorari (pp. 1-5 hereof) as a statement of the case, for the purpose of this brief.

IV.

SPECIFICATIONS OF ERROR.

1. The Circuit Court of Appeals erred in holding (R. 475) that there is no reported case from Montana determining the meaning of a "thereafter" clause in an oil and gas lease reading:

> "It is agreed that this lease shall remain in force for a term of five years from this date and as long thereafter as oil or gas, or either of them, is produced from said land by the lessee." (R.6)

2. The Circuit Court of Appeals erred in refusing to follow the interpretation of a "thereafter" clause identical with the one in our case by the Supreme Court of Montana in *Berthelote v. Loy Oil Co.*, 95 Mont. 434, 28 Pac. (2d) 187, and in assuming and

holding that the language of the Montana court in that case, to the effect that:

> "under the lease, the oil or gas must not only be discovered but must be produced and the production continue thereafter during the entire term," (95 Mont. @ 448)

is not clearly related to the Court's discussion of the "thereafter" clause. (R. 477)

3. The Circuit Court of Appeals erred in applying the fiction resorted to in the *Severson* case, 103 Mont. 526, 63 Pac. (2d) 1022, (which involved gas only) that:

> " 'in the entire absence of a market, the lands * * * have been * * *, in legal contemplation producing gas in commercial quantities; that said lease is still in force and effect,' " (103 Mont. @ 532)

to this case, in which the production of oil only is involved, and in treating as "dictum" the declaration of the Montana court in the *Severson* case that:

> "a different rule prevails with relation to oil wells, as oil, unlike gas, may be stored and divided," (103 Mont. @ 532)

4. The Circuit Court of Appeals erred in failing to apply the law of Montana as to the construction of contracts, as declared by the Supreme Court of Montana in *McDaniel v. Hager-Stevenson Oil Co.*, 75 Mont. 356, 243 Pac. 582, and other cases herein referred to.

5. The Circuit Court of Appeals erred in deciding this case on the assumption that the Montana court would, if a case involving oil only were presented to it, apply the same fiction which it had ap-

plied in the *Severson* case where gas only was involved. (R. 478)

6. The Circuit Court of Appeals erred in sustaining the admission of, and basing its decision upon, evidence in support of the matters of affirmative defense, including alleged lack of market and storage facilities, set forth in paragraph XII of the amended answer.

7. The Circuit Court of Appeals erred in failing to follow the decision of the Circuit Court of Appeals for the Tenth Circuit in the case of *Continental Oil Co. v. Osage Oil & Refining Co.*, 69 Fed. (2d) 19, which decision petitioners contend is in accord with the decisions of the Supreme Court of Montana.

V.

ARGUMENT.

SUMMARY

Argument herein will consist of discussion of the "inquiries" referred to under the title "QUESTIONS PRESENTED" in the petition (pp. 5-8 hereof) and will follow in chronological order the foregoing SPECIFICATIONS OF ERROR".

A.

THE CIRCUIT COURT OF APPEALS FAILED TO APPLY THE LAW OF MONTANA AS DECLARED IN BERTHELOTE, ET AL v. LOY OIL CO., ET AL., 95 MONT. 434.

The *Berthelote* case involved an oil and gas lease

containing a "thereafter" clause identical with the one in our case. In the opinion in that case the court said:

> "'Defendants offered an instruction to the effect that if the lessee had on or prior to February 26, 1931 drilled a well producing oil or gas, then the terms of the lease were satisfied. The offer was denied and this denial is assigned as error." (95 Mont. @ 447)

and in disposing of this specified error said:

> "The instruction was offered on the theory that under a lease as this one, the production of oil or gas in any quantity is sufficient to continue it in existence beyond the fixed term. * * *
>
> Some courts have held that under a similar 'thereafter' clause, any production which is capable of being divided is a sufficient compliance to continue the life of the lease, as in *Gillespie v. Ohio Oil Co.*, 260 Ill. 169, 102 N. E. 1043, and *McGraw Oil & Gas Co., v. Kennedy*, 65 W. Va. 595, 64 S. E. 1027, 28 L. R. A. (n. s.) 959. Suffice it to say that we are not impressed with the reasoning in the cases so holding, and decline to follow them.
>
> * * * * * * *
>
> The offered instruction was otherwise objectionable in that the mere discovery of oil under it validated the lease, whereas under the lease, the oil or gas must not only be discovered but must be produced, and the production continue thereafter during the entire term." (99 Mont. @ 448)

This is an unqualified declaration by the Supreme Court of Montana as to the meaning and effect of a "thereafter" clause such as we have in this case.

Referring to that language, the Circuit Court of Appeals, in its opinion, said:

> "A difficulty with the opinion as authority here is that the court does not clearly relate its discussion to the 'thereafter' clause." (R. 477)

We respectfully submit that, in making that statement, the Circuit Court of Appeals was mistaken and that the language of the Montana Court, quoted above, conclusively establishes that its declaration that production must continue during the entire term of the lease is clearly related to its discussion of the "thereafter" clause. This being true, it is self evident that the decision of the Circuit Court of Appeals that the lease did not terminate upon cessation of production is in conflict with the law of Montana.

B.

IN THE CASE OF SEVERSON v. BARSTOW, 103 MONT. 526, THE SUPREME COURT OF MONTANA REAFFIRMED THE LAW AS DECLARED IN THE BERTHELOTE CASE AND DISTINGUISHED BETWEEN THE LAW APPLICABLE TO GAS AND THE LAW APPLICABLE TO OIL.

In the *Severson* case, the Supreme Court decided that a lease involving production of gas only did not, "in the entire absence of a market," terminate upon cessation of production. To accomplish this result, the Montana Court had to, as said by the Circuit Court of Appeals in its opinion:

> "resort to a legal fiction in order to avoid cancellation." (R. 478).

The fact that the Montana Court had to resort to this fiction to avoid declaring the lease terminated

is an unqualified recognition of the meaning and effect of a "thereafter" clause, as declared in the Berthelote case.

In the *Severson* case the Montana Court said:

> "The court correctly concluded that, 'in the entire absence of a market, the lands * * * have been since the 11th day of May, in legal contemplation, producing gas in commercial quantities; that said lease is still in force and effect.'
>
> Where, as here, the principal consideration for a lease is the payment of royalty, the lease carries an implied covenant to use reasonable diligence to market the product when produced, although the lease is silent on the subject, and whatever is implied in a contract is as effectual as what is expressed; in an action to cancel such a lease, the burden rests upon the lessee to establish the fact of reasonable diligence if he would prevent cancellation. *Berthelote v. Loy Oil Co.*, 95 Mont. 434, 28 P. (2d) 187. The lessees here met this requirement, and, while a different rule prevails with relation to oil wells, as oil, unlike gas, may be stored and divided, in legal contemplation, under the facts shown, this gas well was 'producing' within the meaning of the lease. *Mills & Willingham on Oil and Gas*, 121; *Berthelote v. Loy Oil Co.*, supra; *Pelham Petroleum Co. v. North*, 78 Okl. 39, 188 P. 1069." (103 Mont. @ 532.)

The underscored language is a definite declaration that the "fiction" resorted to and the rule applied as to gas is not applicable to oil. It will be noted that the Montana court cites *Mills & Willingham on Oil and Gas*, 121, in support of that declaration. Those authors state the rule as follows:

> "If the lessee should discover oil in an

> amount sufficient to extend the fixed term, it would be his duty, under the implied covenant for diligent operation, to produce from the well and allow to the lessor his part as royalty. This, for the reason that oil, unlike gas, may be stored in the event there is no immediate market for it.
>
> In the case of the discovery of gas, however, a different proposition is presented for the reason that gas cannot be marketed without a pipe line, which can sometimes be provided only at ruinous expense. Where a well, capable of producing gas, is drilled but the product is not marketed for the lack of facilities, the rule would seem to be that gas is being produced within the meaning of the parties."

In support of that statement *Mills & Willingham* (note at p. 121) cite decisions from West Virginia, Oklahoma, Pennsylvania, Texas, Wyoming and the Federal Circuit Court of Appeals.

The Circuit Court of Appeals has in this case, involving oil only, applied a rule which the Supreme Court of Montana in the *Severson* case, and the courts in practically every oil producing State, say is specifically limited to gas and expressly declare is inapplicable to any case involving oil.

That the "legal fiction" and the rule applied in the *Severson* case cannot be applied in this case, or any case involving only the production of oil, is convincingly demonstrated by the fact that it has never been so applied by the Supreme Court of Montana and so far as the authors of this brief are able to determine, by any court in the United States.

It is also worthy of note that even though the Montana Court in the *Severson* case resorted to a

"legal fiction" to avoid declaring the entire lease terminated, it did declare the lease terminated as to all of the land except that upon which the producing wells were located. (103 Mont., @ 534).

The reason for the difference between the rule as to gas and as to oil is clearly illustrated by an allegation in the amended answer in this case. Although respondents allege that they could not sell nor store the oil which could have been produced from petitioners' land, they allege that, after respondent Tarrant had filled the storage tanks upon the premises (capacity 900 barrels),

> "no facilities were available to him except by continuing the pumping of said wells to capacity and running the oil to some storage company which would exact payment of storage fees, to-wit, from January 1938 and for a long time thereafter, at the rate of approximately one and one-half cents per month per barrel of the oil so stored," (R. 31)

The Supreme Court of Montana in *Anderson v. Mace,* 99 Mont. 421, 45 Pac. (2d) 771, said:

> "It is the general rule that allegations, statements or admissions contained in a pleading are conclusive as against the pleader," (99 Mont. @ 427)

And, in *Gilna v. Barker,* 78 Mont. 357, 254 Pac. 174, the court said:

> "A party is bound by his pleading. He may not plead one thing and contend to the contrary." (78 Mont. @ 368)

As to storage, the Circuit Court of Appeals said,

> "And the storage of the oil underground was as effective as is storage in surface tanks and obviously more economical." (R. 479)

No question as to which method is the more effective is involved in this case. Under the lease respondents were required to produce oil and deliver 1/8th of the oil so produced to "credit of the lessor free of cost, in the pipe line". (R. 7) This they failed to do.

Referring to the rule declared in *Elliott v. Crystal Springs Oil Co.*, 106 Kan. 248, 187 Pac. 692, which is discussed by the Supreme Court of Montana in the *Severson* case, (103 Mont. @ 532) the Circuit Court of Appeals said:

> "The Montana Court declined to adopt so literal an interpretation of the contract." (R. 478).

In the note to that statement the Circuit Court of Appeals said that the rule which the Montana Court declined to adopt is in accord with the rule applied in Texas. To the contrary, the Supreme Court of Montana in the *Severson* case (103 Mont. @ 533) said that the rule in the Kansas case (*Elliott v. Crystal Springs Oil Co.*) is "not in accord with the authorities generally" and in support of that statement cites *Mills & Willingham*, 121, (hereinbefore referred to at p. 20) and authorities from seven states, including Texas.

The fact of the matter is that Montana has consistently followed the decisions of the Texas courts. The case of *Watson v. Rochmill*, 137 Tex. 565, 155 S. W. (2d) 783, (1941) referred to by the Circuit Court of Appeals in the note to its opinion, (R. 478) involved a "thereafter" clause identical with ours except that the primary term was three instead of

five years. In that case the Supreme Court of Texas clearly and concisely states the reasons for the rule that an oil lease terminates automatically upon cessation of production, as follows:

> "There was no production for a period of two years and seven months. The cessation of production for this long period of time was not brought about nor induced by any mechanical breakdown or other condition in connection with the well or the equipment used in connection therewith. The demoralized condition of the oil market and the low gravity of the oil in no wise prevented the operation of the well by the lessee for whatever oil it would produce. These conditions may have rendered it unprofitable to operate the well, but were not contracted against and consequently they did not prevent a lapsation of the lease when production ceased. *Stanolind Oil & Gas Co. v. Barnhill*, Tex. Civ. App. 107 S. W. 2d 746;" (155 S. W. (2d) @ 784)

C.

THE STATEMENT OF THE SUPREME COURT OF MONTANA IN THE CASE OF SEVERSON v. BARSTOW, 103 MONT. 526, THAT "A DIFFERENT RULE PREVAILS WITH RELATION TO OIL WELLS, AS OIL, UNLIKE GAS, MAY BE STORED AND DIVIDED," IS A STATEMENT OF THE LAW OF MONTANA AND NOT "DICTUM" AS STATED BY THE CIRCUIT COURT OF APPEALS.

In its opinion (R. 478 & 479) the Circuit Court of Appeals said that the statement of the Montana Court in the *Severson* case that:

> "a different rule prevails with relation to oil wells, as oil, unlike gas, may be stored and divided," (103 Mont. @ p. 532)

is "dictum".

This Court, in the case of *Six Companies of California v. Joint Highway District No. 13,* 311 U. S. 180, reversed a decision of the Ninth Circuit Court of Appeals, reported in 110 Fed. (2d) 620. In the decision which was reversed the Circuit Court of Appeals had decided that a provision in a construction contract for liquidated damages for failure to complete the contract within a certain time applied although there was an abandonment of the contract by the contractor. This was contrary to a decision of the District Court of Appeals of California in the case of *Sinnott, et al v. Schumacher, et al.,* 45 Cal. App. 46, 187 Pac. 105, and this Court, in reversing the Circuit Court of Appeals, said:

> "Respondent urges that what was said by the District Court of Appeal in the Sinnott Case with respect to the liquidated damage clause was a mere dictum. We do not so regard it. This part of the opinion of the court was its answer to the appellants' insistence that the judgment on appeal was erroneous because the liquidated damage clause had been disregarded and damages had been awarded in excess of the amount for which the contract provided. What the court said as to this was a statement of the ground of its decision. It was a statement of the law of California as applied to the facts before the court." (311 U. S. @ 187)

What was said in the *Severson* case with reference to the "thereafter" clause was in answer to the contention that the clause applied without qualification. The statement that "a different rule prevails with relation to oil wells, as oil, unlike gas, may be

stored and divided," was the very ground of the decision.

In the case of *Montana Horse Products Co. v. Great Northern Ry. Co.*, 91 Mont. 194, 7 Pac. (2d) 919, the Court said:

> "All that is necessary to make a decision of this court authoritative is that there shall appear to have been an application of the judicial mind to the precise question adjudged and that the point was fully considered." (91 Mont. @ 210)

In the *Severson* case the Montana Court, in stating that "a different rule prevails with relation to oil wells", was declaring the law of Montana, which follows the law as settled by the authorities generally, as has been heretofore pointed out. (This Br. pp. 20, 22 & 23).

The statement referred to can only mean that the cessation of production of oil automatically terminates a lease containing a "thereafter" clause such as is contained in the lease in question, even though cessation is because of no market.

In the case of *Union P. R. Co. v. Mason City & Ft. D. R. Co.*, 199 U. S. 160, this Court said:

> "Whenever a question fairly arises in the course of a trial, and there is a distinct decision of that question, the ruling of the court in respect thereto can, in no just sense, be called mere dictum." (p. 166)

See also:

Florida Central R. R. Co. v. Schutte, 103 U. S. 118;

Van Dyke v. Parker, (9th Cir.) 83 Fed. (2d) 35.

If the language of the Montana Court referred to is, in any sense, "dictum", it is, as said by this Court in *Hawks v. Hammill,* 288 U. S. 52, at page 58, "a considered dictum, and not comment merely obiter," and, consequently, controlling upon the Federal Court. Furthermore, as pointed out by the Circuit Court of Appeals for the Eighth Circuit in *Yoder, et al v. Nu-Enamel Corporation,* 117 Fed. (2d) 488, under the implications of *Erie Railroad Co. v. Tompkins,* 304 U. S. 64, and *West v. American Tel. & Tel. Co.,* 311 U. S. 223:

> "* * * it is the duty of the federal court, in dealing with matters of either common law or statute, to have regard for any persuasive data that is available,"

and

> "* * * Any convincing manifestation of local law, having a clear root in judicial conscience and responsibility, whether resting in direct expression or obvious implication and inference, should accordingly be given appropriate heed." (117 Fed. (2d) @ 489)

D.

THE CIRCUIT COURT OF APPEALS FAILED TO FOLLOW THE LAW OF MONTANA RELATING TO THE CONSTRUCTION OF CONTRACTS, AND OIL AND GAS LEASES IN PARTICULAR.

In its construction of the "thereafter" clause, the Circuit Court of Appeals has, in effect, read into the lease a provision declaring that it shall not terminate by cessation of production if the lessee cannot, by the exercise of reasonable diligence, market the

oil. Under the decisions of the Supreme Court of Montana, this cannot be done, and, as said in *Ruhlin v. New York Life Insur. Co.*, 304 U. S. 202, at page 209:

> "The parties and the federal courts must now search for and apply the entire body of substantive law governing an identical action in the state courts."

Section 7529 of the Revised Codes of Montana of 1935 provides:

> "The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity."

In the case of *McDaniel v. Hager-Stevenson Oil Co.*, 75 Mont. 356, 243 Pac. 582, the court said:

> "A contract may not be changed or revised under the guise of interpretation. Where a contract is plain and clear in its terms, neither interpretation nor construction is permissible. (*Ming v. Pratt*, 22 Mont. 262, 56 Pac. 279; *Spaulding v. Maillet*, 57 Mont. 318, 188 Pac. 377.) When the language employed by the parties 'is free from ambiguity or uncertainty, it is beyond the power of the court to enlarge or restrict its application or meaning'. (*Union Bank & Trust Co. v. Himmelbauer*, 56 Mont. 82, 181 Pac. 332.) And when the terms of a contract are plain and unambiguous, resort may not be had to extrinsic circumstances under the pretense of ascertaining its meaning." (75 Mont. @ 361)

In the case of *Story Gold Dredging Co. v. Wilson*, 99 Mont. 347, 42 Pac. (2d) 1003, the court said:

> "The ten-year provision of the contract is clear and unambiguous, and, 'where a contract is plain and clear in its terms, neither interpre-

> tation nor construction is permissible. * * * When the language employed by the parties 'is free from ambiguity or uncertainty, it is beyond the power of the court to enlarge or restrict its application or meaning'. (*McDaniel v. Hager-Stevenson Oil Co.*, 75 Mont. 356, 243 Pac. 582, 584, and cases cited.) 'Courts must enforce contracts as made, not make new ones for the parties, no matter how unreasonable the terms may appear.' (*McConnell v. Blackley*, 66 Mont. 510, 214 Pac. 64.)" (99 Mont. at 355)

This rule of construction is applied by the Supreme Court of Montana with greater strictness in the case of oil and gas leases than in the case of ordinary contracts. In *McDaniel v. Hager-Stevenson Oil Co.*, 75 Mont. 356, 243 Pac. 582, the court said:

> "When a contract is optional in respect to one party it is to be construed strictly in favor of the party that is bound and against the one who is not bound. (*Eastern Oil Co. v. Smith*, supra; *Ireland v. Chatman*, 87 Okl. 223, 209 Pac. 408.) Not only that, but it is a recognized doctrine in this court that oil and gas leases are to be construed liberally in favor of the lessor and strictly against the lessee." (75 Mont. at 366)

Under the "thereafter" clause in the instant case, respondents clearly had the option of terminating the lease by ceasing production.

In *Stanolind Oil & Gas Co. v. Guertzgen*, 100 Fed. (2d) 299, which involved an appeal from the United States District Court of Montana, the Circuit Court of Appeals cited the McDaniel case and applied the above rule, but failed to do so in this case.

The effect of the decision of the Circuit Court of Appeals in this case is to protect respondents from a condition imposed by a contract which they entered into and, in fact, to make a new contract for the parties. The Supreme Court of Montana has declared that this cannot be done, even though the contract seems unreasonable. In *McNamer Realty Co. v. Sunburst, etc. Co.*, 76 Mont. 332, 247 Pac. 166, the court said:

> "We cannot protect the defendant from the condition imposed by a contract which it has entered into, nor make a new contract for the parties because their contract seems unreasonable." (76 Mont. @ 347)

It is clear that the Circuit Court of Appeals, in its decision, failed to apply the law of Montana relating to the construction of contracts.

E.

UNDER THE LAW OF MONTANA, MATTERS OF AFFIRMATIVE DEFENSE, SUCH AS EXCUSES FOR NON-PRODUCTION, MAY NOT BE AVAILED OF IN AN ACTION OF THIS KIND.

It is self evident that this action does not involve "forfeiture". Petitioners' right to relief depends solely upon whether the term of the lease expired pursuant to the "thereafter" clause upon cessation of production.

The distinction between "termination" and "forfeiture" of a lease is decided by the Supreme Court of Montana in *McDaniel v. Hager-Stevenson Oil Co.*, 75 Mont. 536, 243 Pac. 582, wherein the court said:

"Defendant urged plaintiff to give Day or

> his assignee the ten days' notice mentioned in the lease but this the plaintiff refused to do. His judgment was good. The notice was unnecessary. On the fifteenth day of June, 1922, the Day lease came to its end. It expired by limitation. It ceased automatically." (75 Mont. @ 368)

The question of whether a lease has "terminated" under a "thereafter" clause does not involve any inquiry as to whether the lessee has failed to fulfill any obligation. The "thereafter" clause simply defines the term of the lease and the lessee may, as in this case, by ceasing production, create the condition which terminates the lease without violating any obligation.

The Supreme Court of Montana has declared that equitable rules as to relief from a "forfeiture" are not applicable in an action of this kind. In *McNamer Realty Co. v. Sunburst, etc. Co.*, 76 Mont. 332, 247 Pac. 166, the court said:

> "Counsel further argue that, under the circumstances of this case, a forfeiture should not be decreed by a court of equity. In this counsel proceed under an erroneous assumption that this is an action for the cancellation of an instrument. Under the statute and under the complaint, the sublease is considered as a void instrument, only apparently valid on its face, and the relief sought is the clearing of the record or paper title of an apparent cloud existing because an instrument which has ceased to have any effect by reason of its termination still remains of record.
>
> The court was asked, not to declare a forfeiture, but 'to ascertain whether a completed forfeiture existed, and, if so, to remove the cloud.' (*Merk v. Bowery Mining Co.*, 31 Mont. 298, 78

Pac. 519). Under the facts and circumstances shown, as heretofore discussed, the equitable rules as to relief from a forfeiture cannot be applied." (76 Mont. @ 350-351)

In *Thomas v. Standard Development Co.*, 70 Mont. 156, 224 Pac. 870, the Supreme Court of Montana said:

> "We wish to advert to the proposition that in the decree the trial court adjudged and decreed that the lease was 'forfeited'. If it was the intention of the court to use the term 'forfeited' in its strict and technical sense, that portion of the decree was incorrect. It is apparent, however, that the term was used as synonymous with the word 'terminated' as we have used it herein. In any event, it is immaterial what language was used, since by its decree the title was quieted in plaintiffs." (70 Mont. @ 176)

F.

THE CIRCUIT COURT OF APPEALS DECIDED THIS CASE UPON THE BASIS OF WHAT IT THINKS THE SUPREME COURT OF MONTANA MIGHT DO IN A SIMILAR CASE INSTEAD OF ACCORDING TO THE EXISTING LAW OF MONTANA.

Referring to the *Severson* case, the Circuit Court of Appeals said:

> "a careful study of the case as well as the earlier decisions of the Montana court, persuades us that a like fiction would be resorted to in a situation comparable with the present." (R. 478)

This is not a declaration of the law of Montana

but an assumption by the Circuit Court of Appeals of what it thinks the Montana Supreme Court may declare the law to be at some time in the future.

In indulging in this assumption, the Circuit Court of Appeals failed to follow the decision of this Court in *Erie R. Co. v. Tompkins*, 304 U. S. 64, and has done what this Court in *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U. S. 487, said cannot be done. In that case the Court said:

> "* * * the proper function of the Delaware federal court is to ascertain what the state law is, not what it ought to be." (p. 497).

The language of the Circuit Court of Appeals, last quoted, conclusively proves that it has applied a rule which the Supreme Court of Montana in the *Severson* case specifically said is not applicable to a case involving oil.

The statement of the Circuit Court of Appeals that "the earlier decisions of the Montana Court", as well as the *Severson* case, persuaded it that a like fiction would be resorted to in a situation comparable with that presented by this case is difficult to understand. We have been unable to find any Montana case which so indicates. In every Montana case involving an oil and gas lease, the Supreme Court of Montana has adhered to what it said in *McDaniel v. Hager-Stevenson Oil Co.*, supra, to-wit:

> "It is a recognized doctrine in this court that oil and gas leases are to be construed liberally in favor of the lessor and strictly against the lessee." (75 Mont. @ 366).

G.

THAT THE DECISION OF THE CIRCUIT COURT OF APPEALS IS ALSO IN CONFLICT WITH THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT IN THE CASE OF CONTINENTAL OIL CO. v. OSAGE OIL & REFINING CO., 69 FED. (2d) 19, WHICH DECISION PETITIONERS CONTEND IS IN ACCORD WITH THE DECISIONS OF THE SUPREME COURT OF MONTANA.

Petitioners present this contention with a full recognition of the fact that since the decision of this Court in *Erie R. Co. v. Tompkins,* 304 U. S. 64, "conflict among circuits is not of itself a reason for granting a writ of certiorari", as to questions controlled by state law. (*Ruhlin v. New York L. Ins. Co.,* 304 U. S. 202, at 206). However, we respectfully submit that where a decision of another circuit court of appeals is in accord with the decisions of the Supreme Court of a state and the decision of the Circuit Court of Appeals in the case under consideration is in conflict with that decision, it is an additional reason why this Court should grant a petition for writ of certiorari.

In *Continental Oil Co. v. Osage Oil & Refining Co.,* 69 Fed. (2d) 19, at p. 23, the Circuit Court of Appeals for the Tenth Circuit said:

> "* * * If oil is being produced from the land in paying quantities at the end of the definite term, the lease continues so long as oil is so produced, but when production ceases the lease is at an end (*United States v. Brown* (D. C. Okl.) 15 F. (2d) 565, 567)"

See also:

Smith v. U. S., (10th Cir.), 113 Fed. (2d) 191, at p. 193.

We contend that that decision is in full accord with the law of Montana and that, if the decision in this case is allowed to stand, it will result in lack of uniformity, not only between the federal court and the state court, but between Circuit Courts of Appeal.

H.

THE IMPORTANCE OF THE QUESTIONS INVOLVED.

It is common knowledge that practically every Montana oil and gas lease contains a "thereafter" clause similar to the one in question, and that the production of oil is one of Montana's principal industries. Under the decision of the Circuit Court of Appeals, the term of every lease containing such a clause remains uncertain, even though it is clearly defined in the "thereafter" clause thereof.

It is of the utmost importance that there be uniformity between the decisions of the courts of Montana and the Federal Courts with reference to the construction of such a "thereafter" clause, and that the effect of such a clause should not be dependent upon the court in which the case is tried.

Certain undisputed facts aptly illustrate the effect of the decision of the Circuit Court of Appeals in this case upon the rights of the lessors of oil lands.

The uncontroverted documentary evidence, consisting of certified copies of verified reports filed with the Montana State Board of Equalization by respondent Tarrant and the three companies which

he managed and controlled, (R. 398-408) disclose that he marketed, during the period of non-production from petitioners' land, more than 143,000 barrels of oil and stored with a common carrier pipe line company, whose pipe connected with petitioners' wells, more than 25,000 barrels of oil from 15 other leases in the Cut Bank field in which petitioners' land is situated. These reports are plaintiffs' exhibits 36 to 40, (R. 102-108), 58 and 59, (R. 322-340), and are summarized in plaintiffs' exhibit 64, (R. 353, 355 & 357).

Of the 143,000 barrels of oil so marketed by respondent Tarrant, all but 3172.91 barrels were produced from leases from which respondent Tarrant and his companies would receive more than 70% of the oil, (R. 353, 355 & 357). Of the oil which could have been produced from petitioners' land, respondent Tarrant would have received less than 25% of the oil. (R. 353, 355 & 357). Respondent Tarrant testified that for the royalties which he sold he received an average of one thousand dollars per one percent. (R. 363).

There is no explanation in the record as to why respondent Tarrant was not able to market and store oil which could have been produced from petitioners' land and was able to and did market and store oil from other leased lands in the immediate vicinity.

Under this decision any lessee who owns more than one lease may produce and market from those which are profitable to him and fail to produce from those which are not, without having the un-

profitable leases declared terminated even though the "thereafter" clause definitely so provides.

Such a situation will not only affect the rights of individuals but also the economic development of oil lands.

For the foregoing reasons, it is respectfully submitted that the writ should issue.

Dated, Helena. Montana, March 31, 1943.

M. S. GUNN,
of Helena, Montana,

WILLIAM H. HUNT,
BRADFORD M. MELVIN,
HAROLD C. FAULKNER,
of San Francisco, California,
Attorneys for Petitioners.

GREGORY, HUNT, MELVIN & FAULKNER,
of San Francisco, California,

GUNN, RASCH & GUNN,
of Helena, Montana.
Of Counsel for Petitioners.